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Supreme Court, U.S.
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No. 05-128

IN THE

Supreme Court of the United States

HOWARD DELIVERY SERVICE, INC. ET AL.,

Petitioners,

v.

ZURICH AMERICAN INSURANCE CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN HOME ASSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, THE ST. PAUL TRAVELERS COMPANIES, AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

In a bankruptcy case, is an unsecured claim for unpaid premiums owing for a debtor's statutory workers' compensation liability insurance policy entitled to priority under section 507(a)(4) of the Bankruptcy Code as a "contribution to an employee benefit plan arising from services rendered," as held by the Fourth and Ninth Circuits, or is such a claim not entitled to section 507(a)(4) priority, as held by the Sixth, Eighth, and Tenth Circuits?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

STATEMENT 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. Zurich's Claim Is Entitled To Priority Under The Plain Terms Of Section 507(a)(4). 5

B. A Plain Reading Of Section 507(a)(4) To Include Zurich's Claim Is Necessary To Fulfill The Policy Of The Statute. 12

C. The Legislative History Of Section 507(a)(4) Demonstrates That It Encompasses Zurich's Claim... 13

1. The text of section 507(a)(4) is not limited to merely overruling prior case law..... 13

2. Revisions to section 507(a)(4), made after Congress heard testimony recommending changes to the text, demonstrate Congress's intent to give section 507(a)(4) a broad scope inclusive of employee benefit plans of the kind at issue here..... 17

3. Judge Shedd properly concluded that Congress intended to include within the scope of section 507(a)(4) "employee benefit plans" as defined broadly under ERISA. 24

CONCLUSION 26

TABLE OF AUTHORITIES

FEDERAL CASES

Page

In re A.B.C. Fabrics of Tampa, Inc., 259 B.R. 759 (Bankr. M.D. Fla. 2001) 11

In re Allegheny Int'l, Inc., 138 B.R. 171 (Bankr. W.D. Pa. 1992) 7, 25

In re Braniff, Inc., 218 B.R. 628 (Bankr. M.D. Fla. 1998) 11

Brogan v. United States, 522 U.S. 398 (1998) 13, 15

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 5

Employers Ins. of Wausau v. Plaid Pantries, Inc., 10 F.3d 605 (9th Cir. 1993) 7, 9, 12

Employers Ins. of Wausau v. Ramette (In re HLM Corp.), 62 F.3d 224 (8th Cir. 1995) 12

FCC v. NextWave Personal Communications, Inc., 537 U.S. 293 (2003) 9

Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1 (2000) 5

In re Howard Delivery Serv., Inc., 403 F.3d 228 (4th Cir. 2005) ..... *passim*

In re Integrated Health Servs., Inc., 291 B.R. 611 (Bankr. D. Del. 2003) 7

Ivey v. Great West Life & Annuity Ins. Co., 308 B.R. 752 (Bankr. M.D.N.C. 2004) 7, 10, 13

Johnson v. Home State Bank, 501 U.S. 78 (1991) 9

Joint Indus. Bd. of Elec. Indus. v. United States, 391 U.S. 224 (1968) 14

In re The Montaldo Corp., 232 B.R. 853 (M.D.N.C. 1997) 7

Morissette v. United States, 342 U.S. 246 (1952) 25

New Neighborhoods, Inc. v. West Va. Workers' Comp. Fund, 886 F.2d 714 (4th Cir. 1989) 8

NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) 9

Ohio v. Kovacs, 469 U.S. 274 (1985) 9

In re Saco Local Dev. Corp., 711 F.2d 441 (1st Cir. 1983) ..... *passim*

State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.), 144 F.3d 712 (10th Cir. 1998) 12

Toibb v. Radloff, 501 U.S. 157 (1991) 13, 15

In re Birmingham-Nashville Express, Inc., 224 F.3d 511 (6th Cir. 2000) 14

United States v. Embassy Restaurant, 359 U.S. 29 (1958) ..... *passim*

United States v. Locke, 471 U.S. 84 (1985) 15

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 5

STATE CASES

State ex rel. McKensie v. Smith, 569 S.E.2d 809 (W. Va. 2002) 7

STATUTES

11 U.S.C. § 104 (*repealed* 1978) 14

11 U.S.C. § 507(a)(4) ..... *passim*

11 U.S.C. § 507(a)(7)(E) 8

29 U.S.C. § 1002(1) 25

29 U.S.C. § 1002(3) 25

29 U.S.C. §-1003(b)(3) 25

N.Y. Work. Comp. Law § 52 8

W. Va. Code § 23-2-5 8

W. Va. Code § 23-4-1 7

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08 6

MISCELLANEOUS

Timothy A. Huffman, A Guide to Self-Insurance Under the West Virginia Workers' Compensation System, 96 W. VA. L. REV. 781 (1994) 7

Arthur Larson, *Workmen's Compensation Law* § 1.00 (1993) 7

Merriam-Webster's Collegiate Dictionary, 467 (10th ed. 2002) 18

H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 ..... 15, 23

S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 ..... 14, 23

Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong. (1976) ..... *passim*

Report of the Commission on the Bankruptcy Laws of the United States, proposed § 4-405, H.R. Doc. No. 137, pt. 2 (1973), *reprinted in* COLLIER ON BANKRUPTCY, App. 4(c) 18

INTEREST OF THE AMICI

Amici Curiae American Home Assurance Company ("AHAC"), Hartford Fire Insurance Company ("Hartford"), the St. Paul Travelers Companies (collectively, "Travelers"), and the American Insurance Association ("AIA") respectfully submit this brief in support of the Respondent Zurich American Insurance Company ("Zurich"). Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The issue in this case is whether Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4) of the Bankruptcy Code.

Approximately nine out of ten employees in the nation's workforce are covered by workers' compensation insurance, and some form of workers' compensation insurance is mandatory for nearly all employees in all States. On average within the industry, for every premium dollar that workers' compensation insurers take in, they spend almost $1.10 on claims and expenses. Cost components include medical benefits, payments for lost wages, and uncollected premiums.

The ability of insurers to collect premiums -- which obviously is enhanced or diminished by an insurer's ability to claim priority treatment under section 507(a)(4) -- has a direct impact on the availability and cost of workers' compensation coverage. To the extent that insurers are unable to collect premiums from debtors that file for bankruptcy because the insurers' claims do not enjoy priority under section 507(a)(4), workers' compensation insurance will be more costly, and, hence, fewer businesses will be able to obtain it. In addition, to

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[1]Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. To the extent not previously filed, copies of the letters of the parties consenting to the filing of this brief are lodged herewith.

the extent that insurers are unable to recover premiums from debtors that file for bankruptcy, insurers will be more likely to cancel insurance coverage when a debtor suffers financial distress, or require greater assurance of payment through payment devices such as guaranties, bonds, or letters of credit. These further precautions carry significant additional cost that some debtors will be unable to afford, and the added cost will make it less likely that debtors suffering financial distress will be able to recover. Like Zurich, AHAC, Hartford, Travelers, and certain members of the AIA[2] are insurance carriers that write workers' compensation insurance and, thus, the question presented is of vital significance to them.

Consistent with Supreme Court Rule 37.1, the purpose of this brief is to bring to the Court's attention matters that other parties do not intend to address. In addition to analyzing the plain meaning of the relevant statutory text from a distinct perspective, this brief also addresses the evolution of the language of section 507(a)(4) as a result of testimony in Congress favoring inclusion of multiple types of employee benefit plans within its scope. AHAC, Hartford, Travelers, and

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[2] The AIA, founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. AIA members write a major share of workers' compensation insurance throughout the country. Clearly, AIA and its members have a strong interest in the stability of the nation's workers' compensation system. Amici Hartford and Travelers are AIA members, as is respondent Zurich. AIA is headquartered in Washington, D.C., maintains six regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

the AIA respectfully submit that, in deciding the instant controversy, the Court would benefit from consideration of the matters addressed herein.

STATEMENT

This matter arises out of the chapter 11 bankruptcy case of Petitioner Howard Delivery Services, Inc. ("Howard" or "Petitioner"). Prior to Howard's bankruptcy filing, Zurich provided health, disability, lost-wage, and death benefits to Howard's employees under certain workers' compensation insurance contracts. During the 180-day period prior to its bankruptcy filing, Howard became liable to pay premiums for this insurance in the amount of $410,215, giving rise to Zurich's claim.

Zurich filed a proof of claim in Howard's bankruptcy case for the $410,215 in unpaid premiums, asserting that its claim was entitled to priority treatment under section 507(a)(4) of the Bankruptcy Code. 11 U.S.C. § 507(a)(4). Howard objected to the priority treatment of Zurich's claim, and the bankruptcy court upheld Howard's objection. The district court affirmed the bankruptcy court's decision and the Fourth Circuit reversed.

The bankruptcy and district courts employed unsound reasoning in concluding that Zurich's claim is not entitled to priority under section 507(a)(4). Rather than enforce the plain meaning of the statute, both courts enforced their interpretation of its legislative history. As this Court has repeatedly explained, where, as here, the text of a statute is plain, a court should not resort to analysis of legislative history, and certainly may not do so to reach a result at odds with the statutory text.

The bankruptcy and district courts also misinterpreted the relevant legislative materials in concluding that they delineate the particular employee benefit plans covered by the text of section 507(a)(4). Read in context, the legislative history merely provides a non-exhaustive list of the types of employee benefit plans that are included within the scope of the statute. Accordingly, it was improper for the bankruptcy and district

courts to treat the illustrations set forth in the legislative materials as exclusive.

The Fourth Circuit reversed, correctly holding in a per curiam opinion that Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4). *In re Howard Delivery Serv., Inc.*, 403 F.3d 228 (4th Cir. 2005). Judges King and Shedd filed separate concurring opinions, each using a different approach to reach the same conclusion. Judge King concluded that Zurich's claim for unpaid workers' compensation insurance premiums is entitled to priority under section 507(a)(4) based on the plain meaning of the statute, whereas Judge Shedd, finding the term "employee benefit plan" to be ambiguous, reached the same conclusion after looking to the legislative history for guidance. Under either approach, the decision of the Fourth Circuit should be affirmed.

SUMMARY OF ARGUMENT

Zurich holds a claim against Howard for Howard's failure to pay premiums for the workers' compensation insurance coverage that Zurich provided for Howard's employees. The undisputed purpose of this insurance was to provide health, disability, lost-wage, and death benefits to Howard's employees who were injured during the course of their employment. Because Zurich's claim falls within the plain meaning of section 507(a)(4), it is entitled to the priority treatment afforded by the statute.

By its plain terms, section 507(a)(4) affords priority status to claims for "contributions" to an "employee benefit plan" that arise from "services rendered" within 180 days of a debtor's commencement of a bankruptcy case. As numerous courts have properly concluded, insurance plans that provide workers' compensation benefits are classic examples of "employee benefit plans." Moreover, Howard's obligation to pay premiums for Zurich's insurance coverage properly constitutes an obligation to make "contributions" within the meaning of section 507(a)(4). Finally, Zurich's claim properly arises from "services rendered" during the relevant 180-day period because, during this period,

Howard's employees performed employment services and Zurich provided insurance coverage, thereby giving rise to Howard's obligation for the premiums.

In addition, treating Zurich's claim as entitled to priority under section 507(a)(4) is necessary to fulfill the policy of the statute, which is to promote the provision of employee benefits to a debtor's employees. As the First Circuit has concluded: "To allow the insurer to obtain its premiums through the priority would seem the surest way to provide employees with the policy benefits to which they are entitled." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 449 (1st Cir. 1983).

Finally, far from demonstrating that Congress intended to exclude workers' compensation benefits from the scope of section 507(a)(4), the legislative history actually demonstrates the opposite -- that these benefits are precisely the type that Congress intended should fall within the scope of the statute. Accordingly, Zurich's claim is entitled to priority under section 507(a)(4).

ARGUMENT

A. Zurich's Claim Is Entitled To Priority Under The Plain Terms Of Section 507(a)(4).

This Court has made clear that, in construing the Bankruptcy Code, "when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 7 (2000); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this instance, the language of section 507(a)(4) is plain and encompasses Howard's premium obligation. Moreover, the disposition required by this plain reading of the text is hardly absurd. Accordingly, the decision of the Fourth Circuit should be affirmed.

Section 507 of the Bankruptcy Code specifies the types of claims that are entitled to priority treatment in a chapter 11

bankruptcy case. As is relevant here, section 507(a)(4) provides as follows:

> (a) The following expenses and claims have priority in the following order:
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan --
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition . . .; but only
>
> (B) for each such plan, to the extent of --
>
> (i) the number of employees covered by each such plan multiplied by 4,000; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

11 U.S.C. § 507(a)(4).[3]

By its terms, section 507(a)(4) affords priority status to claims for "contributions" to "an employee benefit plan" that arise from "services rendered" within 180 days of the commencement of a bankruptcy case. In this case, Zurich's claim meets all three requirements.

Employee Benefit Plans. While the Bankruptcy Code does not define "employee benefit plan," it is difficult to imagine

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[3]The text is quoted from the statute in effect at all times relevant herein. Although section 507(a)(4) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, the revisions are immaterial to the resolution of this case.

a clearer or more compelling example of an "employee benefit plan" than a workers' compensation insurance program. Generally, a workers' compensation program is "a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries." Timothy A. Huffman, *A Guide to Self-Insurance Under the West Virginia Workers' Compensation System*, 96 W. VA. L. REV. 781, 781-82 (1994) (citing Arthur Larson, *Workmen's Compensation Law* § 1.00 (1993)). As Judge King explained in his concurring opinion, "a detailed contractual arrangement enabling an employer to provide health, disability, lost-wage, and death benefits to employees who are injured in the course of their employment," such as the workers' compensation policy at issue here, is "within the plain meaning of [the] statutory term." *Howard Delivery*, 403 F.3d at 235-36 (King J., concurring). Other courts have also noted:

> Workers' compensation benefits are classic benefits that inure to employees. When an employee is injured on the job, workers' compensation covers health care costs, death benefits, and lost wages. Thus, the underlying payments to injured employees from workers' compensation fit the archetypical examples of employee benefit plans such as health insurance, disability, and pension plans.

In re Integrated Health Servs., Inc., 291 B.R. 611, 613 (Bankr. D. Del. 2003); *see also Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (employer-funded workers' compensation insurance is an "employee benefit plan" within the meaning of section 507(a)(4)); *Ivey v. Great Western Life & Annuity Ins. Co.*, 308 B.R. 752, 756 (Bankr. M.D.N.C. 2004), *aff'd*, 405 F.3d 191 (4th Cir. 2005); *In re The Montaldo Corp.*, 232 B.R. 853, 854-55 (M.D.N.C. 1997); *In re Allegheny Int'l, Inc.*, 138 B.R. 171, 173-74 (Bankr. W.D. Pa. 1992); *State ex rel. McKensie v. Smith*, 569 S.E.2d 809, 817 (W. Va. 2002) (under West Virginia law, workers' compensation coverage "provides benefits to workers who have 'received personal injuries in the course of and resulting from their covered employment'") (quoting W. Va. Code § 23-4-1).

Although it is true that most States *require* employers to provide workers' compensation benefits to employees (by mandating either participation in a state-run fund, complying with a state-monitored self-insurance program, or through the purchase of private insurance), this does not alter the conclusion that workers' compensation insurance fits within the scope of "employee benefit plan." While Petitioner focuses on the "involuntary" aspect of workers' compensation in arguing that such programs are not "employee benefit plans," the fact that States find these benefits to employees so important as to make them mandatory or otherwise the subject of legislation weighs in favor of granting priority, not denying it.[4]

Petitioner also argues that employers gain benefits by providing workers' compensation coverage and, therefore, workers' compensation is not an "employee benefit plan." *See, e.g.*, Pet. Br. at 8. While it is generally true that employers receive benefits (e.g., immunity from tort liability for work-related injuries) in return for providing workers' compensation coverage, and that the obligation to provide workers' compensation benefits is commonly backed by civil and criminal sanctions, *see, e.g.*, N.Y. Work. Comp. Law § 52 (McKinney 1994 & Supp. 2004); W. Va. Code § 23-2-5 (West 2004), it does not follow that workers' compensation is not an "employee benefit plan" entitled to priority under section 507(a)(4). Indeed, section 507(a)(4) contains no limitation based on whether the contribution is pursuant to contract, or is gratuitous, or compelled by applicable law. If Congress had intended any such limitation, it would have included it in the statutory text, and the fact that Congress did not include such a limitation means that it

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[4]Petitioner's reliance on *New Neighborhoods, Inc. v. West Va. Workers' Comp. Fund*, 886 F.2d 714 (4th Cir. 1989), is misplaced, as section 507(a)(4) was not before the court in that case and "the sole question presented [wa]s whether the premiums . . . constitute excise taxes within the meaning of section 507(a)(7)(E)." *See* 886 F.2d at 716.

had no such intention. *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003); *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984).

Whatever the employer's particular motivation or obligation to provide workers' compensation, the relevant inquiry under section 507(a)(4) is whether this coverage constitutes a "plan" that provides "employee benefits." *See Plaid Pantries*, 10 F.3d at 607 ("Nor can we conclude that Congress intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required."). Clearly, insurance coverage that provides health benefits, as well as income, to injured employees that are otherwise unable to earn a living falls within the scope of any reasonable interpretation of the phrase "employee benefit plan." *Id.*

Howard concedes that health insurance coverage falls within the scope of section 507(a)(4). *See, e.g.*, Pet. Br. at 8. As noted, medical care is also one of the benefits provided under workers' compensation insurance. It is difficult to understand why health insurance coverage provided under a health insurance policy qualifies as an employee benefit plan, yet medical care coverage provided under a workers' compensation insurance policy does not. There can be no dispute that benefits provided to employees under workers' compensation policies are just as critical to vulnerable employees in need of such benefits as are the benefits cited by Howard. To the extent that workers' compensation insurance provides the same benefits to employees, the argument in favor of according priority under section 507(a)(4) is equally compelling. Again, the only reasonable interpretation of section 507(a)(4) is that a workers' compensation insurance program is an "employee benefit plan."

Contributions. Similarly, although the Bankruptcy Code does not define the term "contributions" for purposes of section 507(a)(4), the term plainly encompasses a debtor's contractual

obligation to pay premiums for health, disability, lost-wage, and death-benefit coverage under a workers' compensation insurance policy. Indeed, a clearer example of an obligation to make "contributions" is difficult to imagine. *See Saco*, 711 F.2d at 449; *Ivey*, 308 B.R. at 756. As Judge King noted in his concurrence, "an accepted and ordinary meaning of the term 'contributions' is that they include sums 'paid by an employer to [a] group-insurance fund . . . for employees.'" *Howard Delivery*, 403 F.3d at 235 (citation omitted). Howard's obligation to pay for workers' compensation insurance is as much an obligation to make a "contribution" as it would be if Howard itself had been responsible for supplying directly the health, disability, lost-wage, and death benefits that Zurich provided.

Services Rendered. Finally, Howard's obligation to pay workers' compensation premiums arises from "services rendered" by Zurich (i.e., providing coverage to employees that ensures that they will receive benefits) during the 180 days prior to Howard's bankruptcy filing. The text of section 507(a)(4) does not state that the "services" must be "rendered" by "employees" in order to fall within the scope of the statute; nor does it otherwise limit the applicability of the priority to "services rendered" by any particular persons or entities. The absence of any such qualification must be viewed as deliberate, and the most obvious and reasonable interpretation of the phrase "services rendered" in its unqualified form is that Congress recognized that sometimes the relevant services giving rise to a claim would be rendered by employees, sometimes by parties such as insurers, and sometimes by others, such as plan administrators who are not insurers.

Even if the phrase "services rendered" were construed to mean "services rendered by employees," Zurich's claim still qualifies. As Judge King explained, "[i]t is only because workers were employed by Howard (and providing services to it) prior to the bankruptcy filing that Howard's obligation to provide insurance and pay the necessary premiums arises," and reading into section 507(a)(4) a limitation precluding insurance

carriers from priority "seeks to inappropriately limit the breadth of the relevant term." *Howard Delivery*, 403 F.3d at 238.

The Amici take the position that it is clear from a plain reading of the statutory text that Zurich's claim for premiums for the insurance coverage it provided during the statutory period arises from "services rendered" during such period. The Amici note that the Court need not reach the issue whether "services rendered" means "services rendered by employees" or "services rendered by the claimant asserting the claim" in order to resolve this case, as this record presents a circumstance in which "services" were "rendered" by both employees and Zurich during the relevant period.[5]

In sum, the language of section 507(a)(4) is plain and encompasses Howard's premium obligation. Moreover, the disposition required by the plain reading of the text is hardly absurd. Accordingly, the Court should affirm the Fourth Circuit's ruling that Zurich's claim is entitled to priority under section 507(a)(4).

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[5] Some courts have concluded that "services rendered" refers to services performed by the employees of the debtor, while others have concluded that it refers to the provider of benefits giving rise to the claim (here the insurer) rather than the employee. *See In re Braniff, Inc.*, 218 B.R. 628, 631 (Bankr. M.D. Fla. 1998) (citing cases); *see also In re A.B.C. Fabrics of Tampa, Inc.*, 259 B.R. 759, 765-7 (Bankr. M.D. Fla. 2001). In this case, this is a distinction without a difference because coverage was provided and workers were employed in the relevant timeframe. *See Howard Delivery*, 403 F.3d at 238 ("Regardless of whether the term . . . refers to the provision of insurance or is limited to employee's services, the Zurich Claim satisfies this aspect of the Statute.").

B. A Plain Reading Of Section 507(a)(4) To Include Zurich's Claim Is Necessary To Fulfill The Policy Of The Statute.

Like its text, the purpose of section 507(a)(4) is plain. As the First Circuit has explained, "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of compensation," including employer-funded insurance for employees. *Saco*, 711 F.2d at 449. "To allow the insurer to obtain its premiums through the priority would seem the surest way to provide employees with the policy benefits to which they are entitled." *Id.* Thus, "[t]he [insurer] is protected in order to protect [the] employees." *Id.*; *see also Plaid Pantries*, 10 F.3d at 607 ("The purpose of Section 507(a)(4) is to protect workers' benefit plans."). The failure to afford priority to Zurich's claim in this case would undermine the policy of section 507(a)(4).

While the courts of appeals are split over the proper interpretation of section 507(a)(4), they are in agreement regarding the statute's underlying policy concern: to protect employees. Even courts that have denied the applicability of section 507(a)(4) to workers' compensation insurance plans have conceded that the purpose of both section 507(a)(4) and of workers' compensation insurance generally is to benefit employees. *See State Ins. Fund v. Southern Star Foods, Inc. (In re Southern Star Foods, Inc.)*, 144 F.3d 712, 716 (10th Cir. 1998) ("The legislative history makes it clear that Congress enacted section 507(a)(4) to benefit employees."); *Employers Ins. of Wausau v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 226 (8th Cir. 1995) ("workers' compensation programs are certainly designed to benefit employees"). This policy is plainly served by including claims held by insurers within the scope of the section, and disserved by excluding them.

The priority afforded by section 507(a)(4) creates an obvious incentive for insurers to continue to provide coverage to financially troubled debtors (and, in turn, make lost-wage and benefit payments to employees) because, by virtue of the priority, insurers are more likely to receive payment of unpaid

premiums. Conversely, eliminating the priority would lead insurers to decline to continue coverage for troubled firms to the extent that they may cancel coverage under their respective policies for nonpayment of premiums. As one court has recently explained in applying section 507(a)(4) in a similar context:

> An insurance company that continues to provide health benefits to employees during an employer's periods of financial difficulty is protecting employees who stay with the employer. Were insurance companies to not receive priority in bankruptcy, continued health benefits may not be available to the employees of struggling businesses.

Ivey, 308 B.R. at 757. That result obviously would harm the very employees that Congress hoped to protect. Accordingly, allowing Zurich's claim is necessary to fulfill the policy of the statute.

C. The Legislative History Of Section 507(a)(4) Demonstrates That It Encompasses Zurich's Claim.

While a "plain language" analysis demonstrates that workers' compensation insurance premiums fall within the scope of section 507(a)(4), a proper review of the relevant legislative history provides additional support for affirming the Fourth Circuit's decision.

1. The text of section 507(a)(4) is not limited to merely overruling prior case law.

In *Brogan v. United States*, 522 U.S. 398 (1998), this Court admonished that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy -- even assuming that it is possible to identify that evil from something other than the text of the statute itself." 522 U.S. at 403. Accordingly, limitations on plain statutory text cannot be inferred from legislative history. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (declining to infer limitation on section 109 of the Bankruptcy Code based on statements in the legislative history). Notwithstanding the

Court's clear instructions and the unqualified language that Congress selected in enacting section 507(a)(4), some courts, including the bankruptcy and district courts in this case, have erroneously limited the scope of section 507(a)(4) based upon a statement in the legislative materials that, in enacting this statute, Congress intended to overrule *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), and *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224 (1968).

In *Embassy Restaurant*, this Court construed a section of the former Bankruptcy Act of 1898 that granted priority status for claims for "wages . . . due to workmen." 11 U.S.C. § 104 (*repealed* 1978). The Court considered whether a claim for contributions to a labor welfare fund for life insurance and medical benefits qualified as "wages" within the meaning of the provision; concluded that it did not; and, therefore, held that the claim was not entitled to the statutory "wage" priority. 369 U.S. at 35. In response, Congress stated in the legislative materials accompanying section 507(a)(4): "Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands." S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855; *see Howard Delivery*, 403 F.3d at 234.

Some courts have taken the statement in the legislative materials that Congress intended to overrule *Embassy Restaurant*, not simply as an example of Congress's intent in enacting section 507(a)(4), but rather as restricting the section narrowly to accomplish *only* this objective. Noting that, on its facts, *Embassy Restaurant* excluded insurance and other payments that were "bargained-for" "fringe benefits" rather than "wages," some courts have reasoned by implication that the current statute should cover only "bargained-for, wage-substitution-type benefits." *See In re Birmingham-Nashville Express, Inc.*, 224 F.3d 511, 517 (6th Cir. 2000) ("we hold that the term 'employee benefit plan' is limited to wage substitutes"). In his concurrence below, Judge King rejected this approach:

"Put simply, we are not entitled to require an employee benefit plan to qualify as a wage substitute or to require that participation in such a plan be voluntary, thereby engrafting limitations on statutory provisions in order to 'achieve that which Congress is perceived to have failed to do.'" *Howard Delivery*, 403 F.3d at 237 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

Judge King's approach is entirely correct. The terms implicated in *Embassy Restaurant* -- "bargained-for," "wage-substitute," and "fringe benefit" -- do not appear in section 507(a)(4). Moreover, that Congress may have intended section 507(a)(4) to overrule *Embassy Restaurant* does not demonstrate that this was Congress's *sole* purpose or intent in changing the law; nor does it demonstrate that Congress intended section 507(a)(4) to be limited to the facts at issue in *Embassy Restaurant*. *See Brogan*, 522 U.S. at 403; *Radloff*, 501 U.S. at 162; *Saco*, 711 F.2d at 448 (rejecting argument that section 507(a)(4) is limited to the circumstances of *Embassy Restaurant*).[6]

In *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983), then-Judge Breyer, writing for the First Circuit, used a common-sense approach in holding that health, life, and disability insurance premiums owed to an insurer qualified for priority treatment under section 507(a)(4). The debtor in that case employed "several hundred non-unionized employees" and provided them with life, health, and disability insurance. 711

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[6] Furthermore, workers' compensation benefits plainly *are* "wage-substitution-type benefits," even if not "bargained for." Workers' compensation insurance provides lost-wage compensation to injured employees as a substitute for wages they otherwise would have earned. *See Howard Delivery*, 403 F.3d at 240 n.1 (Shedd, J., concurring) ("Under this very broad language, workers' compensation would qualify as 'employee compensation that is not in the form of wages.'") (quoting H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148).

F.2d at 448. The debtor was not bound to provide these benefits under any collective bargaining agreement, but rather offered them on a "unilateral" basis, and did not require any employee contributions with respect to the benefits. *Id.* at 448. Even though the benefits at issue were not "bargained-for" in the sense that they had not been negotiated under a collective bargaining agreement or other contract, the court concluded that they fell within the scope of section 507(a)(4). Acknowledging that Congress enacted section 507(a)(4) to overrule *Embassy Restaurant*, the court stated:

> The controversy in this case is whether Congress meant to create a priority merely in the narrow factual setting present in the two [overruled] Supreme Court cases, as the trustee argues, or whether "contributions to employee benefit plans" should be read more broadly to cover plans that are not the product of collective bargaining and are not administered by a union, as Northwestern contends. The bankruptcy court ruled that the trustee's preferred construction was inconsistent with the language, legislative history, and underlying policies of § 507(a)(4), and that Northwestern's interpretation was correct. We agree.

Saco, 711 F.2d at 448.

The First Circuit examined the legislative history closely and found that "Congress' object in enacting § 507(a)(4) was to extend the 1898 Act's wage priority to new forms of compensation, such as insurance and other fringe benefits." 711 F.2d at 449. The court then rejected the trustee's argument that the unilateral nature of the insurance program precluded priority status, finding that "[i]nsurance is no less a fringe benefit because it is granted by an employer 'unilaterally' rather than being provided under the terms of a collective bargaining agreement. Nothing in the legislative history . . . suggests the contrary." *Id.* at 449. Similarly, the court rejected the trustee's argument that priority status was precluded on the ground that the insurance program was not a "wage substitute," stating: "We

see no merit in the trustee's . . . argument that the employees must have 'substituted' the fringe benefits for wages. Such substitution can normally be assumed, unless the employer is a philanthropist." *Id.* at 449.

Having focused the inquiry on whether the employees received a benefit, the First Circuit concluded that allowing a priority claim for insurance premiums, collectible by insurers, would implement the purpose of the statute:

> Neither do we see any reason to deny insurance companies the right to obtain the priority for premiums attributable to insurance plan fringe benefits. To allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled.

711 F.2d at 449.[7] The same reasoning applies with equal force in this case.

2. Revisions to section 507(a)(4), made after Congress heard testimony recommending changes to the text, demonstrate Congress's intent to give section 507(a)(4) a broad scope inclusive of employee benefit plans of the kind at issue here.

As proposed originally in 1973, the text of section 507(a)(4) read as follows:

> (a) General Order of Distribution. The proceeds of the estate shall be distributed in the following order:

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[7] Amicus NCCMP argues in support of Petitioner that "a bankrupt employer's employees would not have a claim for the unpaid premiums." NCCMP Br. at 15 n.12. This misses the point. If the premiums (i.e., the contribution by the employer) are paid, the employees are entitled to claim the benefits under the policy.

> (4) allowed claims for contributions to *pension, insurance, or similar employee benefit plans* to the extent that the claims arise from services rendered within one year before the date of the petition or the cessation of the debtor's business, whichever is earlier . . . .

Report of the Commission on the Bankruptcy Laws of the United States, proposed § 4-405, H.R. Doc. No. 137, pt. 2 (1973), *reprinted in* COLLIER ON BANKRUPTCY, App. 4(c) at 4-678 through 4-683 (emphasis supplied). In the notes accompanying this proposed text, the Commission stated that, under the proposed section (a)(4), "[t]he longstanding dispute as to whether fringe benefits should be considered wages is mooted." *Id.* at 4-680.[8]

Between 1973, when the above-quoted text was submitted to Congress, and 1978, when Congress enacted the final version of section 507(a)(4), Congress heard the testimony of several witnesses who were concerned that, as originally proposed, the scope of the statute covering "pension, insurance, or similar employee benefit plans" was too restrictive. As a result of this testimony, Congress changed the provision to remove any qualifying language, leaving only reference to "employee benefit plan" as it exists in the current statute. The changes made as a result of this testimony demonstrate that Congress intended a broad definition of "employee benefit plan," not the restrictive interpretation urged by Howard.

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[8] The proposed text was not limited to "fringe benefits," which are defined as "[(1)]an employment benefit (as a pension or a paid holiday) granted by an employer that has a monetary value but does not affect basic wage rates [(2)] any additional benefit." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 467 (10th ed. 2002) (emphasis supplied). Workers' compensation insurance benefits fall within the scope of this definition.

Among those who testified, one witness, Robert A. Georgine, Chairman of the National Coordinating Committee for Multiemployer Plans ("NCCMP"), suggested dropping the qualifying phrase "pension, insurance, or similar" so that subsection (a)(4) would more accurately reflect the scope of benefit programs being made available to employees:

> We would suggest . . . in view of the increased scope of employee benefit plans which exist today, and the corresponding amendments in Section 302(c) of the Labor-Management Relations Act authorizing contributions to such plans, that the phrase 'pension, insurance or similar employee benefit plans', which appears in Section 4-405(a)(4) of the Bills be changed so as not inadvertently to exclude certain other types of plans. Section 302(c) of the LMRA expressly recognizes the value to employees, and to the public at large, of certain programs or funds prominent in the construction and other industries. . . . We would therefore urge that the Bills merely refer to 'employee benefit plans' . . . .

Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary (the "Subcommittee Hearing Report"), 94th Cong. at 2452 (1976) (statement of Robert A. Georgine, AFL-CIO).[9] The same witness also testified: "[L]et me suggest that paragraph (4) of Section 4-405 be amended to parallel the definitions in ERISA. The contributions for which priority treatment should be granted should be any contributions to an employee benefit plan as defined in ERISA § 3(3). This will avoid what I believe is an

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[9] Mr. Georgine also testified as President of the Building and Construction Trades Department, AFL-CIO. *See* Subcommittee Hearing Report at 2451.

unintended ambiguity in the phrase 'similar employee benefit plans.'" *Id.* at 2455.

Beyond suggesting that the ERISA definition be incorporated into the statute, other witnesses brought more kinds of employee benefits and programs to the attention of Congress. Max Zimney, General Counsel, International Ladies Garment Workers Union, AFL-CIO, noted that, under the then-existing bankruptcy laws, "[t]here is no preferment whatsoever for that portion of the wage package devoted to health, welfare, pensions and other worker benefits" and that his goal was to seek congressional "help in correcting these serious legal, economic and sociological deficiencies." Subcommittee Hearing Report at 2421; *see also id.* at 2447 (testimony of Mr. Lawson, Assist. General Counsel, United Steelworkers of America, AFL-CIO) (discussion of worker "welfare" programs and societal need to protect workers). Mr. Zimney further testified:

> We turn now to Paragraph (a)(4). This Paragraph is defective in a number of respects. *First, its description of employee benefit plans is too narrow.* As presently stated, the Paragraph covers only "pension, insurance, or similar employee benefit plans." We submit that the word "similar," confined as it is by specific reference to "pension" and "insurance" plans, is restrictive language. *As now worded, the Paragraph may exclude other very worthy benefit plans which we believe were not intended for exclusion.* Some of the plans which may not be covered by the restrictive wording of the Bills are specifically authorized by Section 302(c) of the Labor-Management Relations Act, 1947 (29 U.S.C.A. § 186(c)), as fringe benefits subject to collective bargaining. They include benefit plans providing for scholarship, legal services, and child care centers; it is likely that 302's list of benefit plan[s] will continue to grow in the future, as it has in the past .... Moreover, Section 302's list of plans is not all-inclusive. *We therefore urge the Committee to adopt the term "employee benefit plans" which is the same term*

> *employed in the Pension Reform Act of 1974. (See Sections 3 and 4 thereof.) This would permit federal bankruptcy law protection now and in the future of all employee benefit plans, without the necessity of difficult, time-consuming legislative amendments.*

Subcommittee Hearing Report at 2424-25 (emphasis supplied).

In addressing the opportunity to change the law as it existed under *Embassy Restaurant*, Mr. Zimney stated:

> When finally such an opportunity presents itself, gentlemen, I suggest to you that we ought to do it right. That is what I am talking about. *First of all, your description of benefit plans is much too narrow. Whoever drew this provision, did not know enough about employee benefit plans.*
>
> You deal with pensions, insurance or similar employee benefit plans. Well, as lawyers know, the meaning of the word "similar" partakes of the words which precede it and the words which precede it are pension and insurance. I suggest to you that the bills may not be catching benefits like scholarships, prepaid legal plans, daycare centers, apprenticeship training and the like which are now part of . . . the Taft-Hartley Act. *As I said earlier, the benefit plan concept is an expanding one.*
>
> *I suggest to you that you ought to use the accordion phrase, "employee benefit plans." You ought not to confine yourself to particular types and rely on the word similar because I don't think that you open up employee benefit plans much beyond the words which precede the word "similar."*

Subcommittee Hearing Report at 2431-32 (emphasis supplied). In addition, Mr. Zimney, like Mr. Georgine, suggested that the statute use the same text as ERISA, stating: "I suggest use of the phrase found in ERISA . . . so that you may for now and in the

future embrace employee benefit plans, which I think is the intention of this section." *Id.* at 2432.

Mr. Jeffrey Gibbs, Counsel of the Industrial Union Department, AFL-CIO, testified:

> [W]e have seen a spectacular increase in governmental interest and support of Federal and State legislation and programs to increase the protection of the worker against the ravages of economic displacement. *Unemployment compensation laws and workmen's compensation laws have been enacted throughout the country, and benefits for those programs have been raised on a regular basis.*

Subcommittee Hearing Report at 2434 (emphasis supplied). Mr. Gibbs noted that these plans included, not just pension and health insurance plans, but those described as worker "welfare" plans as well. *Id.* Recognizing the expanding nature of the benefits being offered to workers, he testified:

> It is incredible to think that despite this fifty-year record of increasing concern for the economic welfare of the displaced worker, the changing structure of employee compensation, and the threefold increase in the cost of living, nothing has been done to make the coverage of the Federal Bankruptcy Act more responsive to the needs of the displaced employee.

Subcommittee Hearing Report at 2435. Mr. Gibbs also criticized the then-state of the law for excluding "deferred benefits such as pensions, health and welfare plans, sickness and accident, annuity, and life insurance benefits," and noted that a "narrow construction" of "employee benefit plans" would stand in contrast with expanding coverage under the "NLRA and other labor legislation," as well as "the regulations of the Cost of Living Council." *Id.* (noting congressional attempts to expand the statute's coverage).

In his testimony, Mr. Stanley Wisniewski, Research Director, Service Employees International Union, AFL-CIO, noted that fringe benefits and wage supplements included

"employer expenditures for retirement programs, health benefit programs, *unemployment benefit programs*, vacation and holiday benefit funds and savings and thrift plans." Subcommittee Hearing Report at 2443 (emphasis supplied).

As Congress moved closer to enacting section 507(a)(4), it modified the proposed text of section 507(a)(4) to eliminate any qualification to the concept "employee benefit plan" and the language of the House and Senate Reports accompanying the modified text recognized the increased scope of benefit and insurance plans being made available to employees. *See* H.R. Rep. No. 95-595, at 357 (1978) ("The priority granted [by section 507(a)(4)] is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, *and others*."), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (emphasis supplied); *id.* at 187, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-48 (noting increased availability of "fringe benefits"); S. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855 (1978). The House Report further states:

> [T]he [new legislation] establishes a new category, a fourth priority, immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and *all other forms of employee compensation that is not in the form of wages.*

H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (emphasis supplied); *see also Howard Delivery*, 403 F.3d at 240 n. 1 (Shedd, J., concurring) (discussing congressional reports and stating that, "[u]nder this very broad language, workers' compensation would qualify as 'employee compensation that is not in the form of wages'") (quoting H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148).

In sum, the testimony that Congress heard in considering proposed section 507(a)(4), and Congress's reaction to this testimony, evident in its revision of the proposed text, demonstrates that Congress intended the scope of the section to

include every type of employee benefit plan, not simply those of one kind or another; those that are "bargained-for" versus mandated by state law; or those that qualify only under some restrictive interpretation of a "fringe benefit." In particular, Congress heard testimony regarding employee benefits obtained through collective bargaining agreements; considered whether items such as scholarship programs, prepaid legal plans, day-care benefits and apprenticeship training should be included; and was asked to consider aspects of the Taft-Hartley Act, the Labor-Management Relations Act, and the regulations of the Cost of Living Council. Witnesses also referred to worker "welfare" programs as part of the discussions about worker benefits. *See* Subcommittee Hearing Report at 2421, 2447. In addition, witnesses discussed benefit plans required by state legislation, such as unemployment and workers' compensation, designed to protect "the worker against the ravages of economic displacement." *Id.* at 2434. Faced with all of this descriptive testimony, Congress did not limit the scope of section 507(a)(4) to any particular items or programs. Nor did Congress exclude programs directed by state law. Rather, Congress simply chose an "accordion phrase" -- "employee benefit plan" -- that could encompass all such plans. *Id.* at 2432. Congress then imposed a monetary limitation on claims allowed under the new statute. This demonstrates only that Congress intended the phrase "employee benefit plan" to have a broad meaning that encompasses precisely the kinds of benefits provided through workers' compensation insurance policies.

3. Judge Shedd properly concluded that Congress intended to include within the scope of section 507(a)(4) "employee benefit plans" as defined broadly under ERISA.

As noted, part of the testimony recommending that the scope of the original proposed text of section 507(a)(4) be expanded was from witnesses who suggested that Congress adopt in section 507(a)(4) the same definition of "employee benefit plan" as that used in ERISA. *See* Subcommittee Hearing Report at 2432 (Mr. Zimney stating: "I suggest use of the phrase

found in ERISA . . . so that you may for now and in the future embrace employee benefit plans, which I think is the intention of this section."); *id.* at 2455 (Mr. Georgine suggesting use of the ERISA definition to avoid "an unintended ambiguity"). Thereafter, Congress ultimately chose to use in section 507(a)(4) the same phrase -- "employee benefit plan" -- that is used in ERISA, under which the definition of "employee benefit plan" clearly includes workers' compensation benefits. *See* 29 U.S.C. §§ 1002(1), (3); *Howard Delivery*, 403 F.3d at 239-41 (Shedd, J., concurring).

Judge Shedd focused on these aspects of the legislative history in concluding "that Congress intended the phrase 'employee benefit plans' in the bankruptcy priority provision to have the same meaning that it has in ERISA." *Howard Delivery*, 403 F.3d at 240.[10] Given the evolution of the statutory text in light of the testimony discussed above, it is more than reasonable to infer that Congress intended workers' compensation insurance plans to be included within the scope of section 507(a)(4). *See, e.g., Allegheny Int'l*, 138 B.R. at 173-74; *cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").[11]

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[10] Amicus NCCMP's argument that ERISA does not regulate state-run workers' compensation programs, *see* NCCMP Br. at 24-5, is misplaced. ERISA's regulation is irrelevant. At issue are ERISA's definitions. 29 U.S.C. § 1003(b)(3), cited by NCCMP, expressly includes workers' compensation programs mandated by state law within the scope of ERISA's definition of "employee benefit plans."

[11] Congress did not limit the scope of section 507(a)(4) by including a reference to ERISA.

CONCLUSION

As demonstrated above, the plain language of section 507(a)(4) includes premiums owed to an insurer for workers' compensation insurance. This reading of the statute also gives effect to its essential purpose. To the extent the Court deems the legislative history of section 507(a)(4) to be relevant, that history demonstrates that Congress removed all language of limitation from the text initially proposed in response to testimony expressing concern that the original provision was too restrictive. As the statute evolved, Congress expanded its scope to include precisely the types of benefits and claims at issue in this case. For the foregoing reasons, the Court should affirm the decision below.

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